NO. 4204.

In The

United States Circuit Court of Appeals

Ninth Circuit

EMERY VALENTINE, for himself and all other taxpayers of the City of Juneau, Alaska,

APPELLANT,

vs.

R. E. ROBERTSON, B. M. BEHRENDS, as Treasurer of the City of Juneau, and the CITY OF JUNEAU, ALASKA,

APPELLEES.

Brief and Argument.

JAMES WICKERSHAM,
JOSEPH W. KEHOE,
GROVER C. WINN,
Attorneys for Appellant.

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STATEMENT OF THE CASE

This suit was begun in the District Court for the First Divsion of the Territory of Alaska, by the plaintiff, appellant, as a taxpayer in Juneau, Alaska, for himself and all other taxpayers therein, to restrain the defendants from expending the funds of the city for purposes outside the municipal powers of the city.

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AMENDED COMPLAINT

The amended complaint alleges, in brief, that on the 18th day of January, 1924, the city council of Juneau, passed an ordinance or resolution (the

answer disclosed that it was a resolution), appropriating the sum of Two Thousand ($2,000.00) dollars of the public money in the city treasury, and directing that it be paid to Robertson, as a competent person selected by the council to defray his expenses to Washington, D. C., and return and to engage him while there to lobby before Congress and to present the desirability of the division of the Territory of Alaska into two territories, the erection of a government dock and public building and the establishment of a United States Land Office at Juneau, the dredging of Gastineau channel near Juneau, the digging of Hawk Inlet and Oliver Inlet canals, the establishment of a mail route on the north shore of Chichagof island, the dredging of Wrangell Narrows, and other objects set forth in said resolution.

It is further alleged that at said meeting on January 18, 1924, the council ordered a warrant drawn to Robertson in the sum of Fifteen Hundred ($1,500.00) dollars, and that he be privileged to draw for Five Hnundred ($500.00) dollars additional; that these sums be paid by the defendant city treasurer; that the $1,500.00 was paid to Robertson and was at that time in his possession, in Juneau, unexpended; that there was a collusion between the defendants and that no city official would attempt to stop the payment of the remaining $500.00 nor to recover the $1,500.00 in Robertson's

hands; that the proceeding was ultra vires and void; and prayed for an injunction to restrain the payment and expenditure of the money.

Page 2, Transcript.

On filing the original complaint the court granted a temporary restraining order, and on filing the amended complaint an amended restraining order, enjoining any further action in issuing an additional warrant for $500.00, or expending the $1,500.00 so delivered to Robertson, till the further action of the court on application for a permanent restraining order.

Page 14, Transcript.

ANSWER TO COMPLAINT

To the amended complaint defendants filed a demurrer (page 18, Tr.), and also their answer (page 20, Tr.). The answer generally admits the substantial allegations of the amended complaint, but denies the part charging the intention to lobby, and certain conclusions in the amended complaint alleging *ultra vires*. With respect to the allegation in the amended complaint that the money was appropriated to pay Robertson for services and expenses to Washington, D. C., to do lobbying before Congress, paragraph IV of the answer generally denies, "*but admits that said R. E. Robertson was*

employed as set forth in the resolution hereinafter set forth."

Page 23, Transcript.

In paragraph VI of the answer, "the defendants deny that R. E. Robertson accepted the employment to act as such lobbyist, as set forth in the amended complaint; *and deny that said R. E. Robertson agreed to act in any manner different from the manner set forth in the affirmative answer*" etc., (page 23, Tr.). While the answer does not deny paragraphs IX and X of the amended complaint, the subsequent allegations in defendants' affirmative defense show the allegations in IX and X are true in fact and in law.

The affirmative defense set up in defendant's answer, we think, admits all the allegations stated in our amended complaint by restating and affirming them, though in different language.

The Affirmative Answer alleges (briefly stated):

Page 24, Transcript.

I.

That the City of Juneau is a municipal corporation—and names its officials.

II.

That the City of Juneau is the commercial center, etc., and alleges its business importance.

III.

That the City of Juneau is the owner of its streets; that it needs new and permanent paving

which the city is unable to do unless it is authorized to issue bonds to pay therefor; that before it can be authorized to do the work it is necessary to have an Act of Congress authorizing the issuance of said bonds; that a bill has been prepared and introduced into Congress of the United States by the Delegate from Alaska, which if passed will give such authority; "*that it is necessary in order to secure the passage of said bill, to have a person who is conversant with the facts appear before the Committees of Congress to explain the facts of said Committees and work in conjunction with the delegate from Alaska to secure the passage of said bill authorizing said issuance of bonds.*"

IV.

That many persons in S. E. Alaska had chosen R. E. Robertson to represent them in Washington, D. C., "*and advocate certain legislation in connection with certain projects hereinafter enumerated in the Resolution passed by the City Council of the City of Juneau, on January* 18, 1924."

V.

That said S. E. Alaska projects would be of great benefit to the city of Juneau,—and the city council endorsed them.

VI.

"That the citizens of the City of Juneau and the community surrounding Juneau had made arrangements with said R. E. Robertson for him to

proceed to Washington, D. C., *and for him to use his best endeavors to forward the passage of legislation advancing the aforesaid projects, at which time the said R. E. Robertson consented to act for the city of Juneau in connection with the passage of the bill allowing the City of Juneau to issue bonds for street improvements, and to use his best endeavors before the committees of Congress by explaining the facts to them and the needs of the City of Juneau in this connection, if the City of Juneau would appappropriate sufficient money to pay his expenses in going to Washington."* Page 27, Tr.)

VII.

That on the 18th day of January, 1924, the common council of the City of Juneau, Alaska, passed a resolution setting forth the attitude of the city in regard to said several projects and appropriating Two Thousand ($2.000.00) dollars in order to defray the expenses of R. E. Robertson to Washington, D. C., which money so appropriated or so much thereof as was necessary, *was to be used by said Robertson in paying his expenses to Washington, while there, and return, in representing the city in connection with the bill authorizing the City of Juneau to issue bonds for street improvement purposes, a copy of which resolution is attached hereto, marked Exhibit A, and made a part hereof.* (Page 27, Tr.)

VIII.

That the City of Juneau derives its revenues, etc., from taxes on real and personal property, profits from its city dock, license taxes, police funds, etc.

IX.

That on the 19th day of January, 1924, Robertson cashed his warrant for $1,500.00 and now has the money in the bank. (Page 28, Tr.)

RESOLUTION OF CITY COUNCIL

The affirmative defense in the defendant's answer is based wholly upon the resolution passed by the city council making the appropriation of $2,000.00, authorizing its payment and expenditure, and providing for securing the services of the defendant Robertson. (See Exhibit A, pages 30-38 Tr.)

In the amended complaint it is alleged that this resolution was passed by the city council on January 18, 1924 (Page 3, Tr.). This case was begun on January 28th when the original complaint was filed and the first temporary injunction was issued. On January 29th the amended complaint was filed, alleging the passage of the resolution of January 18th, 1924, and upon the allegations in the amended complaint an amended and additional restraining order was issued and served on the defendants (Page 15, Tr.).

After all this had transpired, and at 7:30 P. M. on the evening of the 29th of January, 1924, the

city council was convened and an effort made by mutilating and amending the resolution of January 18th to insert in it apt phrases upon which to hang a defense to the action then pending. These facts appear upon the face of the defendant's answer and are subject to our demurrer thereto. (Page 27-28, Tr.) The attention of the Circuit Court of Appeals is especially called to this procedure and the mutilation of Exhibit A thereby. While our demurrer is held to admit the facts stated in the Answer, we call attention to the true facts, as shown in relation to this mutilation of the Resolution, on January 29th.

Even as thus mutilated and amended the resolution of January 29th, defendant's Exhibit A, (page 30, Tr.), covers the whole field of endorsement of political projects far distant from Juneau, as the following quotation therefrom will show: (Page 32, Tr.)

"Be it resolved that the common council endorse the projects referred to in the written resolutions, to-wit:

Division of the Territory of Alaska.
Erection of a government dock at Juneau.
Erection of a government building at Juneau.
Dredging of Gastineau Channel at Juneau.
Digging Hawk Inlet Canal.
Digging Oliver Inlet Canal.
Establishing a mail route on the north shore of Chichagof Island.
Establishing a Land Office at Juneau, Alaska.
Dredging of Wrangell Narrows."

Page 32, Transcript.

Then follows nine long whereases setting forth

the reasons why the city council endorsed these projects, followed by another denouncing the abandonment of Chilkoot Barracks, etc. Having endorsed all the political projects in S. E. Alaska, the Common Council then declared (all italics mine):

"And whereas it has become necessary to establish permanent streets in the city of Juneau *and in order to do so it is necessary that an Act of Congress be passed allowing the city of Juneau to issue bonds to make said street improvements;*

"And whereas a bill has been introduced in the United States Congress looking towards said authorization; and whereas *a local representative, familiar with the facts, should be sent to Congress to represent the facts to the committees of Congress and to work in conjunction with the delegate from Alaska to secure the passage of this bill;*

"And whereas the citizens of the city of Juneau have taken a great interest in the matters hereinbefore endorsed and have been negotiating with R. E. Robertson, a person eminently fit and conversant with the above matters, with a view of sending him to Washington to present the above mentioned matters to the committees of Congress; and whereas the city of Juneau is able to procure the services of said R. E. Robertson *in connection with the bill aforementioned* looking towards the authorization of the town of Juneau to issue bonds for street improvement without any further expense to the city of Juneau than the payment of said R. E. Robertertson's expenses to Washington, D. C., which the city of Juneau is able to do from funds in the treasury without laying a special tax for the purpose, and without increasing the levy for the current year.

"BE IT RESOLVED *that sufficient monies be appropriated out of the municipal treasury for the*

purpose of paying the expenses of said R. E. Robertson in connection with his trip to Washington, D. C., not exceeding the sum of Two Thousand ($2,000.00) dollars, and that a warrant be drawn in the sum of One Thousand Five Hundred ($1,500.00) dollars on the city Treasury in favor of said R. E. Robertson; and that he be privileged, if he find it necessary, to draw on the city treasury for the additional sum of Five Hundred ($500.00) dollars, which motion was seconded by Councilman McKinnon and upon the call of the roll upon the adoption of the motion, all councilmen present voted 'yea' and the motion was declared carried.

Signed: I. Goldstein, Mayor.
Wm. J. Reck, City Clerk."

Page 37-38, Transcript.

DEMURRER TO ANSWER

To this answer the plaintiffs filed a demurrer that it appears upon the face of the answer that the same does not state facts sufficient to constitute any defense or counterclaim to the said amended complaint of the plaintiff herein (Page 38, Tr.). On the argument the various matters now in the Assignment of Errors were presented to the court by which they and the demurrer were overruled.

JUDGMENT FOR DEFENDANTS

Since the pleadings taken together sufficiently stated the admitted facts, counsel for plaintiff announced to the district court that plaintiff stood upon his demurrer and would not reply; the court upon motion of the defendants entered judgment dissolving the restraining orders, dismissing plaintiff's case, and for costs in favor of the defendants,

to all of which plaintiff excepted, and took this appeal.

Page 57, Transcript.

SPECIFICATION OF ERRORS RELIED ON.

Page 61, Transcript.

The decree in this case is erroneous because the district court erred as follows:

I.

The court erred in overruling the plaintiff's demurrer to the defendant's affirmative answer.

II.

The court erred in holding that the matters set up in defendants' answer constituted any defense to the allegations in plaintiffs amended complaint.

III.

The court erred in holding that the common council of the city of Juneau, Alaska, had power or authority to adopt and pass the resolution of January 18th, 1924, and (or) the amended resolution of January 29th, 1924, for the payment of the sums therein mentioned to defendant Robertson for the uses therein set forth, or at all.

IV.

The court erred in holding that the treasurer of the city of Juneau, Alaska, or the city of Juneau, Alaska, had power and authority to make the payment of the sums mentioned in the said resolutions of January 18th and 29th, 1924, or either of them, to the said Robertson, for the uses therein set forth.

V.

The court erred in refusing to grant the prayer of the plaintiff's amended complaint.

VI.

The court erred in dismissing the plaintiff's complaint and action and in rendering judgment for defendants and against the plaintiff herein.

Page 61-62, Transcript.

POINTS AND AUTHORITIES

The main question in this case, if not the only one, is: Had the city council of Juneau power to authorize the appropriation of Two Thousand ($2,000.00) Dollars, or any sum, for the purposes declared in its resolution of January 18th, 1924, as amended by its resolution of January 29th, 1924?

The powers of the municipal corporation of Juneau are fully stated and limited in Chapter 97, Session Laws, Alaska, 1923, Art. 3, Sec. 12, pages 196-200:

"Sec. 12. General Authority of Council. The Council shall have and exercise the following powers:

First: To adopt rules and by-laws for their own proceedings.

* * *

Ninth: To assess, levy and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale, etc.

* * *

Seventeenth: To take such other action, by ordinance, resolution or otherwise as may be necessary to protect and preserve the lives, the health, the safety and the well being of the people of the city."

It is not claimed by the defendants that there is any special authority contained in the statutory charter giving the common council of Juneau power

to pass the resolutions of January 18th and 29th, 1924. In his argument in support of the defendants' acts the district judge does not point out any special statute which contains such power, but bases his conclusions on cases from other states where the charter powers may be entirely different.

Appellant contends there is no statutory or other authority in the council of Juneau to appropriate its public municipal funds for the uses stated in the resolutions of January 18th and 29th; that such appropriation was in direct violation of the letter and spirit of the city charter powers and, therefore, ultra vires and void..

RIGHT OF TAXPAYER TO MAINTAIN THIS SUIT

In his opinion the district judge states the correct rule in respect to this phase of this case:

"There is no question but that a taxpayer may enjoin the payment of moneys from the municipal treasury where the sum is about to be illegally appropriated by the municipal authorities. Public moneys in the treasury of a municipal corporation are held in trust by the municipal authorities for the benefit of the inhabitants thereof. The city council function as trustees and the citizens of the town are *cestui que trust; and a resident tax payer* may invoke the action of the court to prevent the misappropriation of municipal funds, or the illegal creation of a debt by the corporate authorities. See Crampton v. Zabriskie, 101, U. S. 601; Russell v. Tate, 13 S. W. 136; McIntire v. El Paso County, 61

Pac. 237; Lundler v. Milwaukee Elec. R. Co., 83 N. W. 851; 2 Dillon Mun. Corp. pp. 915-919, and notes; 3 McQuillan Mun. Corp. Sec. 2575; 19 Ruling Case Law, page 1163."

Page 45, Transcript.

FACTS ADMITTED BY DEMURRER

There can be no dispute about the facts in this case. They are alleged in the amended complaint and answer. The plaintiff is bound by the allegations in the amended complaint, and the defendants by such admissions as they made in their answer. The defendants are bound by their allegations in their answer, and the plaintiff is bound thereby also because of his demurrer thereto, upon which he stands in this court. So all the facts are before the court in the amended complaint and answer, and are admitted by the law.

Let it be clearly understood, however, that the law only compels us to admit our own allegations and those in the answer, but not those stated by the judge below in his argument and opinion.

For instance: in his opinion, at page 49, Transcript, the lower court makes the following statement of fact:

"As against the demurrer, the facts alleged in the complaint (answer?) must be taken as true. Boiled down, it appears from the answer that Mr. R. E. Robertson is City Attorney, and as such acts in a legal advisory capacity to the city council; the answer further shows that it is necessary for the

city council to provide funds for the construction of permanent streets; that under the bill now pending in Congress, the city is authorized to bond itself for that purpose, and that the appropriation of the money, payment of which is sought to be enjoined hereby, is to pay his expenses in going to Washington, to lay before Congress the necessity for relief in that regard by the passage of the Bill."

Our demurrer to the answer compels us to stand on the facts well pleaded in the answer, but this statement is so at variance with the facts in the answer that we call the attention of this court to it that we may not seem to admit the judge's version.

The only allegation in all the pleadings in respect to Robertson's official connection with the city of Juneau is the last clause of paragraph 1 in the answer, where it is alleged "and that the defendant R. E. Robertson **is** the acting city attorney" (Page 24, Tr.). In another part of the opinion the lower court states: "It is alleged, in substance, that R. E. Robertson **is** the acting city attorney", etc. (Page 48, Tr.). Here again the court mistakes the admitted fact; it is not alleged "in substance", but categorically, in the paragraph 1 of the affirmative answer as above stated.

We are bound by our demurrer to the enforced admission that at the time the affirmative answer was made and filed "that the defendant R. E. Robertson *is* the acting city attorney" (Page 25, Tr.), but we are not bound by the further statement in relation thereto made by the judge in argument.

Sec. 10, Chap. 97, Session Laws of Alaska, 1923, being the legislative charter of cities like Juneau, provides for the appointment by the council of a "municipal attorney" while Section 11 provides that in certain contingencies a "municipal attorney" may be elected for a term of one year. There is nothing in the record to show that Robertson was ever appointed or elected "municipal attorney" for Juneau ,and the allegation in the answer that the defendant R. E. Robertson *is the acting city attorney*" is a fair denial of the fact "that the defendant R. E. Robertson *is the city attorney, and as such acts in a legal advisory capacity to the city council.*" (Page 49, Tr.). Going outside the record, as the lower court did, we deny that statement. He was not at any time mentioned in this record, the municipal or city attorney for Juneau, except as it may be argued he was such "acting city attorney" *by reason of his appearance as attorney for the defendants, including himself, in the case at bar.*

Of course these matters may seem small and immaterial, and we would not notice them except the lower court seems to lay much stress on Robertson's official character, and also extends beyond their meaning other allegations in the affirmative defense covered by our demurrer. We think we are entitled to a correct statement of the facts. We respectfully suggest that the whole quotation we make from the opinion of the lower court is in dis-

agreement with the facts as admitted by our demurrer, and that the court was misled thereby to our prejudice in his application of the law to the real facts stated in the pleadings.

ROBERTSON'S REAL OFFICIAL CHARACTER.

In paragraph III of our amended complaint (Page 3, Tr.), we charge that the council by its resolution of January 18th provided for the employment of a competent person to go to Washington, D. C., *"to lobby before the Congress of the United States, for the division of the Territory" and certain other objects named therein;* and in paragraph IV (Page 4, Tr.) that the council *"selected and empowered the defendant R. E. Robertson as the delegate to go to the city of Washington under the terms of said ordinance or resolution and perform the various acts of lobbying for the enactment of legislation by Congress to procure the division of the Territory of Alaska, and other objects set forth in said ordinance or resolution."*

Page 4, Transcript.

In brief, we alleged the employment of Robertson by the city to do lobbying in Washington for the objects stated in the resolution, and the money whose payment it was sought to enjoin was appropriated to pay his expenses to Washington to do that lobby work.

We think the answer admits in the most sub-

stantial manner all the facts we alleged including the charge of lobbying.

The paragraph III of the answer to our paragraph III in the amended complaint concludes by a general denial to "*the whole and every part thereof, except as stated in the affirmative defense herein,*" (Page 21, Tr.).

Paragraph IV. of the answer to paragraph IV of our amended complaint admits that the council "*selected, empowered and employed the defendant, R. E. Robertson, as their delegate to go to the city of Washington, D. C.*, but denies that Robertson "*was employed by the city of Juneau to perform the various acts of lobbying,*" etc., "*but admit that said R. E. Robertson was employed as set forth in the resolution hereinafter set forth.*" Page 23, Transcript.

Paragraph VI of the answer to our paragraph VI of the amended complaint denies "that R. E. Robertson accepted the employment to act as such lobbyist, as set forth in the amended complaint, "*and deny that said R. E. Robertson agreed to act in any manner different from the manner set forth in the affirmative answer; and admit that said R. E. Robertson agreed to make the trip to Washington, D. C.,*" *etc.* (Page 23, Transcript.)

These denials and admissions amount to no more than a reference of the whole point in controversy to the facts stated in the resolutions.

A careful examination of the matter stated in the affirmative defense also brings us to the facts stated in the resolution, Exhibit A, attached to the answer, as the source of the controversy, and the basis of the defense. If the matter stated in that resolution contains enough to authorize the council to make the appropriation complained of the court will affirm, otherwise it will sustain our demurrer and reverse the case. The affirmative defense stands on the resolution, Exhibit A. (Page 30, Transcript.)

This resolution, remodeled on January 29th, 1924, was an afterthought, prepared after the amended complaint and restraining order was served on the defendants, but as we view it, does not materially assist the defendants, and shows upon its face the character in which Mr. Robertson was to go to Washington as delegate to assist the official Delegate from Alaska to secure the enactment of a wide range of legislation for the to-be-newly-created territory of Southeastern Alaska, and many other laws mentioned therein.

The resolution endorses the nine specific Acts of Congress which Mr. Robertson is to secure, repeats all the "whereases" and boosting arguments in favor of them at length, with special "whereases" in favor of a bill to improve the streets of Juneau, and concludes with the final resolution making the appropriation of $2,000.00 to pay Robertson's expenses to Washington and return.

We submit this document shows plainly and clearly the intention of the council of Juneau:

1. To endorse the various projects of the division of the Territory of Alaska into two territories, and also the eight other projects mentioned therein, equally.

2. That "*a competent person be selected by the common council of the city of Juneau to personally present these projects to the United States Congress and to work in conjunction with the Delegate from Alaska for the passage by Congress of bills covering appropriations for the above projects*, and resolve that sufficient funds be appropriated out of the municipal treasury and not exceeding Two Thousand ($2,000.00) dollars *for the purpose of defraying the expenses necessary to send the above mentioned person to Washington, D. C.*" (Page 31, Transcript.)

The attention of the court is called to the fact that the original resolution, of which the last above quotation is a part (and also repeated in Exhibit A) *was passed on January 18th*, 1924, *and the money paid to Robertson under that supposed authority on the 19th day of January*, 1924. See Paragraph IX of the affirmative defense where that fact is specially alleged. (Page 28, Transcript.)

3. That after the passage of the resolution of January 18th above quoted, and the payment to Robertson of $1,500.00 under that clause, and on

January 29th—ten days later—the resolution of January 18th was remodeled as it now exists in Exhibit A. (Page 30, Transcript.)

4. That in the whereas in the newly stated Exhibit A resolution of January 29th it is declared, by additions (Italics mine):

"And whereas a Bill has been introduced in the United States Congress looking toward said authorization; and whereas *a local representative familiar with the facts should be sent to Congress to present the facts to the Committees of Congress and to work in conjunction with the Delegate from Alaska to secure the passage of this Bill;*

And whereas the citizens of the city of Juneau have taken a great interest in the matters hereinbefore endorsed and have been negotiating with R. E. Robertson, a person eminently fit and conversant with the above matters, *with a view of sending him to Washington to present the above mentioned matters to the committees of Congress;* and whereas the city of Juneau is able *to procure the services of said R. E. Robertson in connection with the Bill aforementioned looking towards the authorization of the Town of Juneau to issue bonds for street improvement without any further expense to the city of Juneau than the payment of said R. E. Robertson's expenses to Washington, D. C.*, which the city of Juneau is able to do from funds in the treasury without levying a special tax for the purpose, and with-

out increasing the tax levy for the current year." (Page 37, Transcript.)

Then, as a conclusion to the whole of the two resolutions of January 18th and that of January 29th, remodeling it, the council passed this:

"Be it resolved, *that sufficient monies be appropriated out of the municipal treasury for the purpose of paying the expense of the said R. E. Robertson in connection with his trip to Washington, D. C.*, not exceeding the sum of Two Thousand ($2,000.00) dollars, and that a warrant be drawn in the sum of One Thousand Five Hundred ($1,500.00) dollars on the city treasury in favor of said R. E. Robertson; and that he be privileged, if he find it necessary, to draw on the City Treasury for the additional sum of Five Hundred ($500.00) dollars, which motion was seconded by Councilman McKinnon and upon the call of the roll upon the adoption of the motion all councilmen present voted "Aye" and the motion was declared carried.

I. Goldstein, Mayor.

Wm. J. Reck, City Clerk."

Page 37-38, Transcript.

5. The motion thus adopted was the whole of Exhibit A including so much of the Resolution of January 18th as was included therein.

6. No part of the resolution of January 18th under which Robertson was paid the $1,500.00 of January 19th and the 21st was revoked or repealed

by the resolution of January 29th, Exhibit A.

7. Special attention is called to the fact that the resolve in Exhibit A confirms the payment of the money formerly paid to Robertson under the resolution of January 18th, *for the purpose of paying the expense of the said R. E. Robertson in connection with his trip to Washington D. C.* (Page 37, Transcript.)

8. And the payment was not limited in any way to services for lobbying for the Bill for street improvements in Juneau. It was as much for division of the Territory and the eight other projects.

9. That a fair construction of the affirmative defense and the resolutions embodied in Exhibit A is that the money appropriated was to be and was paid to Robertson as the chosen delegate of the council to go to Washington and lobby for all the projects thus endorsed in the resolutions. The contract was one and indivisible and was not in any manner limited to municipal purposes for the benefit of the municipality of Juneau.

AN APPROPRIATION FOR FUTURE LOBBY SERVICES VOID.

Judge Reed fairly held, we think, that the money so appropriated in connection with Mr. Robertson's trip to Washington was for lobbying, and he said "But not all contracts to expend moneys to persons to secure legislative action are void." (Page 50, Transcript.)

In his argument and opinion he said:

"Mr. Robertson, according to the answer, is the acting city attorney and legal adviser of the city. He is not to receive any compensation, contingent or otherwise, for his services." (Page 51, Transcript.)

Probably not from the city of Juneau, but how does the court know what he is to receive from the various citizens of Southeastern Alaska, who are also shown to be so deeply interested in the eight or nine other projects endorsed by the resolutions of January 18th and 29th in Exhibit A?

"He is not seeking to influence Congress for the private benefit of any person or class of persons." (Page 51, Transcript.)

There are a great many persons in Juneau who disagree with that statement of the matter, and the record does not justify the conclusion.

"He will represent the municipal corporation for public municipal purposes." (Page 51, Tr.)

How can any one guess that in view of the language of Exhibit A? And, too, "lobbying" for the other eight or nine projects admitted in the affirmative answer and the resolutions is not a "municipal purpose".

In short, no one can tell from the allegations in the affirmative defense, and Exhibit A, just what the delegate of the council may do in Washington. And the record shows, by the official resolve of January 18th and 29th, that he is authorized to do lobby

work for all the projects mentioned therein; that there is no separation of those which are foreign to the municipality of Juneau from that claimed to be special to it; that the appropriation is general for "*paying the expenses of the said R. E. Robertson in connection with his trip to Washington, D. C.,*" which includes, and was intended to include, all the projects. The contract of employment was (1) general as to all the projects mentioned in the resolutions; (2) was not limited in the character of the work to be done by Mr. Robertson to professional services; (3) but was broadly an employment to solicit members of Congress and others to enact all the bills necessary for the creation of the eight or nine projects endorsed; (4) without any limitation upon the class or kind of solicitation, honest or dishonest.

Even if we assume (and it must be an assumption) that Mr. Robertson will not violate the ethical rules of his profession, it is a lobbying contract broad enough to permit another person not so honestly inclined to resort to every class of dishonest lobbying,—and *it is the contract we are criticising* and not Mr. Robertson. He may be honest and ethical, but the next lobbyist employed under this identical precedent may not be either—and it is the general rule the court must consider, and not the assumption that Mr. Robertson will not do *what he is clearly permitted to do* under this resolution.

We respectfully urge, therefore, that the service to be performed by Mr. Robertson under these resolutions is that of lobbying—soliciting congressmen in Washington; that it is general, and not limited to the municipal wants of Juneau, nor limited to ethical services, but broad and unlimited, and includes every vice of lobbying which the law condemns.

IS THE CONTRACT A VALID ONE?

Lobbyist. One who frequents the lobby or the precincts of a legislature or other deliberate assembly with the view of influencing the votes of the members.

Black's Law Dictionary
Century Dictionary
Colusa County v. Welch (Cal) 55 Pac. 243.
La Tourneux v. Gilliss (Cal) 82 Pac 627.
Sweeney v. McLeod (Or) 15 Pac. 275.
Trist v. Child, 88 U.S. 441, (448) 22 L. Ed. 623.

What is a lobbyist? A lobbyist is defined to be one who frequents the lobby or the precincts of a legislature or other deliberative assembly with the view of influencing the views of the members. Sometimes defined as a person who hangs around legislators and solicits them for the purpose of influencing legislation. "To lobby" is to solicit members of a legislative body, whether in the lobby or elsewhere, with the purpose of influencing their votes. Webster's Dict.; Worcester's Dict.; Century Dict. Tit. "Lobby—lobbyist". "To lobby" is for a person not belonging to the legislature to address or

solicit members of a legislative body, in the lobby or elsewhere away from the house, with a view of influencing their votes. Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co. 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601. "Lobbying services are generally defined to mean the use of personal solicitations, the exercise of personal influences and improper or corrupt methods, whereby legislative or official action is to be the product. A contract for such services is void, and cannot be enforced. Dunham v. Hastings Pavement Co. 56 App. Div. 244, 67 N. Y. Supp. 632-634; Trist v. Child, 88 U. S. (21 Wall.) 441-448, 22 L. Ed. 623; Oscangan v. Arms Co. 103 U. S. 261, 22 L. Ed. 539."

Burke v. Wood, 162 Fed. 533, 537, 541.

The leading case in the Federal courts in this class of cases—not involving, however, the wants of power in municipal bodies—is that of Trist x. Child, 88 U. S. 441, 22 L. Ed. 623. That was a suit by Child against Trist to recover for services in prosecuting a claim before Congress; the defense was that it was a contract for lobbying and therefore void. The Supreme Court sustained the defense, saying:

"Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of a claim.

* * * *

The question now before us has been decided by four American cases. They were all ably considered, and in all of them the contract was held to be against public policy and void. Chippinger v. Hepbaugh, 5 Watts & S. 315; Harris v. Roof, 10 Barb. 489; Rose v. Truax, 21 Barb. 361; Marshall v. R. R. Co., 16 How. 314. We entertain no doubt that in

such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid.

* * * *

But such services are separated by a broad line of demarcation from personal solicitations, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

* * * *

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate and, considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The Law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

* * * *

If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every assessible point. It would invite their presence and offer them a premium.

* * * *

We are aware of no case in English or American jurisprudence like the one here under consideration,

where the agreement has not been adjudged to be illegal and void. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defenddentis.* Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case at hand. The law is no respector of persons."

Trist v. Child, 88 U. S. (21 Wall.) 441.

Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899.

Providence Tool Co. v. Norris, 69 U. S. (2 Wall.) 45; 17 L. Ed. 868.

And in the case at bar there is no charge of dishonest or unprofessional conduct against Mr. Robertson—*he has not yet done any act, good or bad* —but the charge is directed against the authority granted by the resolutions of January 18th and 29th, which is broad enough to authorize in the name of the city, every phase of lobby practice condemned in the Trist v. Child case—good or bad. .

It was held by the United States Court of Appeals, Sixth Circuit, Judges Taft, Lurton and Severens:

"The contract must stand or fall dependent upon the validity or invalidity of the ordinance as it was enacted. Trist v. Child, 21 Wall. 441."

Manhattan Trust Co. v. City of Dayson, 59 Fed. 327, 333.

Under such a contract as that in this case the lobbyist may do all the evil things condemned by the courts—*it is this illgal contract which is ultra vires and void.* If the contract is held valid in this case, because no evidence is presented that Mr. Robertson has acted unethically, it must be held valid in all other cases, until the lobbyist is convicted. Such a holding will open wide the door to all the evils of lobbying, so universally condemned by the law and the courts.

"It is the duty of the court to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrong doing. Hence the relief asked for in such cases should not be granted. This result follows "without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. Tool Co. v. Norris, 2 Wall. 45, Trist v. Child, 21 Wall, 444, 452, 22 L. Ed. 623; Meguire v.

Corwine, 101 U. S. 108, 111, 25 L. Ed. 899; Oscanyan v. Arms Co. 103 U. S. 261, 275, 26 L. Ed. 539."

Washington Irr. Co. v. Krutz, 119 Fed. 279, 286. (Ninth Circuit).

In Herrick v. Brazee (Or.) 190 Pac. 141, the Supreme Court of Oregon has followed the principles so clearly stated in Trist v. Child, Supra, and other Federal cases, and said:

"A valid distinction is made between lobbying services in procuring the passage of legislation and strictly legitimate professional services of an attorney directed to that end," etc.

It is also important to note in this Oregon case, that Congress legalized the contract objected to, in the Act appropriating the fund to pay the claims.

All agreements to influence a legislative body are void, even though it is not shown that corrupt action or secret or improper means are contemplated. It makes no difference in this view of the case whether undue influence or solicitation was in fact used. It is sufficient to vitiate the agreement if such means are within its scope, although not actually employed or even expected.

Trist v. Child, 88 U. S. (21 Wall.) 441; 22 L. Ed. 623.

Sussman v. Porter, 137 Fed. 161.

Owens v. Wilkinson, 20 App. D. C. 51.

Colusa County v. Welch (Cal.) 55 Pac. 243.

La Tourneux v. Gillis, (Cal.) 82 Pac. 627.

Sweeney v. McLeod, (Or.) 15 Pac. 275.

Hyland v. Oregon Paving Co. (Or.) 144 Pac. 1160.

Glenn v. S. W. Gravel Co. (Okla.) 177 Pac. 586.

McGuffin v. Coyle & Guss, (Okla.) 85 Pac. 954, 86 Pac. 962.

Wood v. McCann, 6 Dana. (Ky.) 366.

Henderson v. City of Covington, 77 Ky. (14 Bush) 312.

Usher v. McBratney, 3 Dill 385. Case No. 16, 805 Fed. Cas. Reported by Judge Dillon, (See Note.)

MUNICIPAL POWERS IN ALASKA

Towns in Alaska have only such powers as are expressly granted to them by Congress or by the Legislature, and such implied powers as are necessary to enable them to carry into effect those expressly granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established.

In re Bruno Monro, 1 Alaska 279.

Ketchikan v. Citizens Co. 2 Alaska 120.

Conradt v. Miller, 2 Alaska 433.

Fairbanks v. Meat Market, 4 Alaska 147. .

Town of Ketchikan v. Zimmerman, 4 Alaska 336, 341.

Ballaine v. Seward, 5 Alaska 734.

Valdez v. Valdez Dock Co., 5 Alaska 399. .

Juneau Ferry Co. v. Morgan, 236 Fed. 204.

The following authorities support the general rule:

Ottowa v. Carey, 108 U. S. 110, 27 L. Ed. 669.

Concord v. Robinson, 121 U. S. 165, 30 L. Ed. 885.

Hill v. Memphis, 134 U. S. 198, 33 L. Ed. 887.

Barnett v. Denison, 145 U. S. 135, 36 L. Ed. 652.

Stone v. Bank of Commerce, 174, U. S. 412, 43 L. Ed. 1028.

Dillon Mun. Corp. 4th Ed. Sec. 89.

McQuillan Mun. Corp. Vol. 5, Sec. 2165.

In the case at bar the judge of the lower court in his opinion lays down the rules applicable to the power of a municipal corporation, in the following language:

"It is well settled that a municipal corporation has such powers and such only as (1st) are expressly granted; (2) are fairly or necessarily implied from those granted; (3rd) are essential to the declared objects or purposes of the incorporation.

As to the third, it is not enough that they be convenient, or general, or indirectly act for the advantage of the corporation. It must appear that they are indispensable to the purposes of the corporation, and in case of doubt of the existence of the power of the corporation to make an appropriation, the same should be denied by the court. If the project or purpose for an appropriation is made under the pretence of actual authority but intended to promote some unauthorized purpose, the courts will declare it illegal. If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal notwithstanding

it also involves as an incident an expense which, standing alone, would not be lawful; but if the primary purpose of an appropriation is to promote some purpose not within any express or implied powers of a corporation, the expenditure would be illegal, even though it may incidentally serve some public purpose (See McQuillan on Municipal Corporations, Vol. 5, paragraph 2165." (Page 47, Tr.)

We concede this is a correct statement of the rules of law applicable to the case at bar, but we do not concede the court made a correct application of these rules to the admitted facts in the record in this case.

ALL ACTS BEYOND THE SCOPE OF THE POWERS GRANTED ARE VOID

The rule in the 8th Circuit is stated clearly in the case of City of Fort Scott v. W. G. Eads Brokerage Co., 117 Fed. 51, 54, as follows:

"Municipal corporations are creatures of the statutes under which they are organized and operated. By those statutes their powers are granted, measured, and limited. Beyond the limit of the powers there expressly granted and those fairly implied therefrom or incident thereto they cannot lawfully act or agree to act, and a fair and reasonable doubt of the existence of a corporate power is fatal to its being. Contracts for the lawful exercise of the powers of a corporation are binding and enforceable. But agreements of municipalities beyond the scope of their granted powers are null, and as though they had not been. They are void against the state because they are unlawful assumptions of powers which it has reserved. They are void between the parties to them, because those

parties are charged with knowledge of the statutes, and of the limits of corporate powers there fixed; and no formal assent of corporations or officers, no alleged estoppel can give validity to such agreements, or induce the courts to enforce them. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co. 51 Fed. 309, 316, 2 C. C. A. 174, 230; I. Dill. Mun. Corp. (3rd Ed.) Sec. 89; Central Transp. Co. v. Pullman's Car Co. 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; McCormick v. Bank, 165 U. S. 538, 549, 17 Sup. Ct. 433, 41 L. Ed. 817. Bank v. Kennedy, 167 U. S. 362, 367, 17 Sup. Ct. 831, 42 L. Ed. 198; Bank v. Hawkins, 174 U. S. 364, 370, 19 Sup. Ct. 739, 43 L. Ed. 1007; Putney Bros. Co. v. Milwaukee Co. (Wis.) 84 N. W. 822, 823; Trester v. City of Sheboygan, (Wis.) 58 N. W. 747; Mousseau v. Sioux City (Iowa) 84 N. W. 1027; Von Schmidt v. Widbur (Cal.) 38 Pac. 682; Dube v. Peck, (R. I.) 48 Atl. 477, 479; Gaslight & Coke Co. v. City of New Albany (Ind. Sup.) 59 N. E. 176, 178; James v. City of Seattle, (Wash.) 62 Pac. 84, 79 Am. St. Rep. 957."

The following citations from California, Oregon and Washington quote the same general rule:

Galindo v. Walter (Cal.) 96 Pac. 505..

City of Arcata v. Green (Cal.) 106 Pac. 86.

City v. Lisenby (Cal.) 166 Pac. 333, 335.

Naylor v. McColloch (Or.) 103 Pac. 68.

Robertson v. City (Or.) 149 Pac. 545, 547.

State v. Tacoma (Wash.) 166 Pac. 66.

State v. Bridges (Wash.) 166 Pac. 780.

The case of Henderson v. the City of Covington, 77 Ky. (14 Bush) 312, is on all fours with the case at bar. As to the *power of the council to pay expenses of this kind, for lobbying*, that court said:

"With the question whether their corporate powers should be enlarged, the corporate authorities, as such, had no concern. Their duties and powers were ascertained and fixed by the legislature which created the corporation to exercise the powers granted, and perform the duties imposed, and the city council has no authority to appropriate any of the revenues of the city except to enable it to discharge some duty imposed by law, or to accomplish some object for which the corporation was created. (Stetson v. Kempton, 13 Mass. 271). The members of the city council, in their capacity of citizens, had a right to apply to the legislature to enlarge the powers of the corporation; but it would be dangerous in the extreme to hold that they might employ the power already granted and the money belonging to the city to obtain, through persons sent by them to appear before the General Assembly, an increase of the powers of the corporation. If the authorities of cities and towns, may, at their discretion, use the corporate revenue to procure such legislation as they may deem to the interest of their municipalities, the worst consequences may be apprehended. Such a practice would inevitably lead to abuses, and the history of municipal corporations in this country during the last quarter of a century gives ample warning of the danger of relaxing the well-established rule that municipal charters are to be strictly construed, and the powers of corporate authorities confined to such as are granted in express words, or are necessarily and fairly implied, or are essential to the objects of their creation."

Appellant offers this Kentucky case to the court as containing the very principle upon which we choose to stand in the case at bar.

In the case of Colusa County v. Welch (Cal.),

55 Pac. 243, 245, the court said of the power of county supervisors in a similar case:

"In the case at bar the supervisors had no duty in the premises to perform. They had no authority to influence, or to employ others to influence, the legislature in the action which, in its wisdom, it should see fit to take. If the board could do so in the present case, then, by a parity of reasoning, it could do so in all matters of revenue, and in all cases which might indirectly affect the interests of the country. If the board of a given county may exercise such authority, then like boards in all other counties may exercise like authority in like cases, and there is a possibility of a corps of attorneys being always in attendance upon sessions of the legislature to influence the action of members in matters confided to the judgment of the latter. There is no such authority given, either directly or by implication, to boards of supervisors, and the attempt to exercise it by the board in the case at bar was null and void."

The same rule is established in the State of Washington:

"The city Council (of Seattle) passed an ordinance providing that a committee, consisting of the whole council and such executive officers of the city as might be chosen by the council, should visit certain cities (Duluth, West Superior, St. Paul and Minneapolis, Minn., Great Falls, Mont., Spokane, Wash. and others) to secure information on subjects of water works, street paving, street lighting, etc. Certain members of the council visited the cities named, and made expenditures for their transportation, board and lodging; and thereafter a claim of one of the members was reported by the council and approved, and the ordinance adopted, directing a warrant to be drawn for the claim, and appropri-

ating money from the general fund to pay the same; HELD, that as the compensation of a member of a council may not be changed during his incumbency of office, and as the expenditure could not be regarded as necessarily essential for municipal purposes, and no expenditure of money for such a purpose being expressly authorized by legislation, or impliedly authorized by reason of necessary grant of power, the council had no authority to pass the ordinance directing the payment of the claim, and making an appropriation therefor."

James v. City of Seattle, 62 Pac. 84.

A more recent case in Washington makes the same point in relation to want of power in a municipal corporation to spend public money to defeat a referendum limiting its powers. State v.Superior Court, 160 Pac. 755.

"This corporation, the port of Seattle, is a creature of the State. It is in the nature of a municipal corporation engaged in the business of building wharves and docks and harbor improvements, and in operating and maintaining the same. Its powers are given by the State. If the State desires to limit those powers, the port itself and its commissioners have no special interest therein. They are simply agents of the State, and it seems absurd to say that an agent of the State may be permitted to expend money of the State for the purpose of defeating a proposed curtailment of the powers of that corporation by the State. No such power is expressly granted to the corporation, and it is not a necessarily or fairly implied incidental power to those expressly granted.

* * * *

We are of the opinion, therefore, that the port of Seattle, and its commissioners have not authority

to expend the money of the corporation in an endeavor to defeat any law which has been passed by the legislature, and referred to the people for approval or rejection. The approval or rejection of the amendment proposed to the Port of Seattle is a matter of no concern to the port itself, or its commissioners. As stated above, this corporation is a branch of the State government, municipal in its character, and its authority is limited to the powers expressly granted or necessarily inferred from express grants. If the port commissioners may take the money of the port, acquired by taxation upon property within the district or otherwise, for political purposes, or purposes other than those for which the port was organized, then there is no limit upon the port commissioners in expending the money of that port. The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office, and because of that reason, use the funds of the port to insure their own election. We are clearly of the opinion that, when the port was created, no thought was held by any person that the money raised by the port could be used for political purposes, or any purpose other than for the direct use of the port and its business."

The case of Fields v. City of Shawnee (Okla.) 54 Pac. 318, is squarely in point *on the want of power of a municipality to make the agreement;* the syllabus of the case, *by the court*, states the point clearly:

"The defendant, a municipal corporation, entered into a contract with the plaintiff to go to Washington to present facts and reasons to the Secretary of the Interior to induce said officer to require the location of a railroad upon a line running

through the limits of the territory of the defendant corporation, and agreeing to pay the plaintiff for said services, Held, that said contract was not in furtherance of any purpose for which the defendant corporation was created, nor within the general scope of its powers; that it was therefore ultra vires and void, and no recovery could be had thereon."

The same rule prevails in Massachusetts:

"Another less important question is presented in this case. The town, in 1881, voted to appoint a committee to appear before the Legislature and procure the passage of an act authorizing the town to pay these bounties, with authority to employ counsel if necessary. The committee employed counsel and procured the passage of the act above cited in 1882, and rendered its bill of expense to the town, which at a meeting held on Sept. 2, 1882, voted to pay the bill of the committee. It was clearly no part of the duty or functions of the town to procure the passage of this statute, and it cannot legally appropriate money to pay the expenses of procuring its passage. Minot v. West Roxbury, 112 Mass. 1, Coolidge v. Brookline, 114 Mass. 592."

Mead v. Acton (Mass.) 1, N. E. 413.

Frost v. Belmont (Mass.) 6 Allen, 152, 163.

In Rose v. Truax, 21 Barb. (N. Y.) 361, It is said that an agreement in respect to lobby services, and in effect providing for the sale of an individual's personal influence to procure the passage of a private law by the legislature, is void, as being inconsistent with public policy, and will not support an action; and if the contract be an entire one, and if it be void in part, it is void in toto.

A municipal corporation has no power to ap-

propriate city funds to purchase gold medals for members of the city council; Sillcocks v. City of New York, 11 Hun. 431; nor to entertain visiting editorial party; Gamble v. Village of Watkins, 7 Hun. 448; nor to pay the city funds to procure draftees in the army, 13 Misc. Rep. 707, 35 N. Y. Supp. 167.

It has been held that a county may not employ attorneys to contest a division of the county; Henley v. Clover, 6 Mo. App. 181; nor to litigate a matter in which the parties interested were certain towns of the county, and not the county; People ex rel Slossom v. Weschester Co. 116 App. Div. 884, 102 N. Y. Supp. 402; nor in general may the county employ attorneys where there is no clear authority to do so. Kersey v. Turner, 99 Ind. 257.

MUNICIPAL POWER IN DOUBT

Any doubt as to the existence of a particular power will be resolved against the city and the right to exercise it denied.

Egan v. City of S. F. (Cal.) 133 Pac. 294.
City x. Lisenby (Cal.) 166 Pac. 333.
Kellar v. City (Cal.) 178 Pac. 505.
State v. Gas Co. (Mont.) 173 Pac. 799.
In re Lankford (Okla.) 178 Pac. 673.
Sharkey v. City (Mont.) 155 Pac. 266.
Cole v. City of Seaside (Or.) 156 Pac. 569.

City of Fort Scott v. Eads. (8th Circuit) 117 Fed. 51.

Omaha El. Co. v. Omaha, (8th Circuit) 179 Fed. 455.

Boise v. Boise Water Co. (9th Circuit) 186 Fed. 705.

NOTICE AS TO MUNICIPAL POWER.

"Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporations and they must guide their conduct accordingly. Murphy v. City of Louisville, 9 Bush. 189."

Stone v. Bank of Commerce, 174 U. S. 412. 424, 43 L. Ed. 1033.

POWER TO PROCURE CONGRESSIONAL LEGISLATION.

The court will take judicial notice that by the Act of Congress of May 7, 1906, 34 Stat. L. 169, the Congress authorized the people of Alaska to elect a delegate to the House of Representatives with the general powers of a Representative in Congress, with certain well known exceptions. It follows that the City of Juneau has no power to pay its funds for the services or expenses of a private Delegate (or lobbyist) to perform the duties of that official, either to oppose or assist him therein, any

more than it would have the power to appropriate the funds to pay the expenses of a municipal delegate (or lobbyist) to go to Washington to oppose or assist the President of the United States, or some Department or Bureau of the Government, in respect to his or their Alaskan duties.

The power thus lodged in the Delegate from Alaska by Congress is exclusive in so far as the Territory of Alaska and its municipal corporations are concerned. It seems that a mere statement of this matter concludes the argument on the question of power.

The power of a municipal attorney is also clearly limited by Sec. 23, Chap. 97, Sess. Laws, Alaska, 1923, as follows:

"Sec. 23. Duties of Municipal Attorney. The municipal attorney shall be the legal advisor of the council and other officers of the city in reference to their official duties, and he shall represent the city as attorney in all civil and criminal proceedings in which the city is interested."

We submit that this is a limitation on his right to go to Washington to solicit legislative action, even if Mr. Robertson was or is municipal attorney, which the admitted facts show he is not.

GENERAL WELFARE CLAUSE—POWER.

The powers specially granted to the municipal corporations in Alaska are set out in the Act of the last legislature, and are followed by a general welfare clause, as follows:

Chap. 97, Sess. Laws of Alaska, 1923, Art. 3, page 196.

"Sec. 12, General authority of council. The common council shall have and exercise the following powers: —then follows the grant of specific powers, and then—

"Seventeenth: To take such other action by ordinance, resolution or otherwise as may be necessary to protect and preserve the lives, the health, the safety and the well being of the people of the city."

Sess. Laws Alaska, 1923, page 200.

There is no other general welfare clause in the Act. Clearly the appropriation made of the city funds by the common council of Juneau in its resolutions of January 18th and 29th, as declared in the Answer, will not tend to protect and preserve the "lives" or the "health", or the "safety" of the people of Juneau, and no such claim is or can be made in the argument. Will the appropriation for the uses alleged "protect and preserve" the "well being" of the people of the town?

The Century Dictionary gives this definition of "well being". "Well being. Well conditioned existence; good mode of being; moral or physical welfare; a state of life which secures or tends toward happiness."

"Well conditioned.. In good or favorable condition; in a desirable state of being; as, a well conditioned mind."

These and other definitions of the words included therein seem to refer to the moral or physical welfare of the inhabitants of the town, to their safety and happiness in their homes, and do not, certainly, cover a plan of using their public moneys for jaunts to Washington to solicit legislation about which the people have not been consulted in a legal way, by ballot or otherwise.

The established rule in respect to the construction of the powers conferred by a "general welfare clause," such as that above quoted, is stated in 28 Cyc, pages 705, 706, and the rule stated as follows:

"In either case this "general welfare clause" must be construed as conferring no other powers than such as are within the ordinary scope of municipal authority, or which are necessary to accomplish municipal purposes."

Watson v. Thompson, 116 Ga. 546, 42 S. E. 747, 94 Am. St. Rep. 137, 59 L. R. A. 602.

Leavenworth v. Norton. 1. Kan. 432.

New Orleans v. Phillippi, 9 La. Ann. 41.

Spaulding v. Lowell, 23 Peck. (Mass.) 71.

The rule in the Federal courts is clearly stated in a case from the Sixth Circuit, where the court said:

"It is the settled rule that any such general words and phrases following or in connection with the granting of enumerated powers are to be construed in connection with such granting, and do not operate to convey broad powers disconnected with the previous subjects of the grant. In other words, it is the accepted theory of construction as applied

to municipal charters that the statute specifies with reasonable particularly the powers granted, and thus limits and defines the municipal government established, and that "general welfare" and similar clauses are intended to operate, and do operate, only so far as necessary to carry out and effectuate the specific grants. This rule has not been better expressed than by the Supreme Court of Tennessee, in construing this very charter. In Long v. Taxing District, 75 Tenn. (7Lea) 134, 138, (40 Am. Rep. 55), Judge Cooper said:

"If the only power given to pass ordinances be by a general provision, the provision would be liberally construed. But if the general grant is given in connection with, or at the end of, a long list of specified powers, the power conferred by the general clause would be restricted by reference to the other provisions of the act. Even in the broadest view, the general power would only authorize suitable ordinances for administering the government of the city, the preservation of the health and comfort of its inhabitants, the convenient transaction of business within its limits, and for the performance of its general duties required by law of municipal corporations. It would **not** authorize general legislation proper only for the Legislature of the State. To sustain such legislation by a municipal council, there must be special authority."

Cumberland Tel. & Tel. Co. v. City of Memphis, 200 Fed. 657..

AUTHORITY RELIED ON BY DEFENDANTS.

The only decision cited by the court below which gives support to the defendant's theory in this case is that of Meehan et. al. v. Parsons, 271, III, 546, III, N. E. 529. An inspection of that case shows (1) it

reverses the opposing view of the Illinois Appellate Court, (2) without citing a single authority in support of its view, and (3) does not state the law of Illinois granting power to the municipal corporation whose acts it sustained.

Upon this barren case this court is now asked to overturn a well established principle of municipal law, and we respectfully suggest that the court ought not to take that action without a more careful examination of the principle than the Illinois court gave in its decision.

Under the legislative grant of powers to municipal corporations in Alaska, and the general rules of construction announced by the courts, *there was no power in the common council of Juneau to appropriate municipal funds for the object stated in the Resolutions of January* 18*th and January* 29*th*, depended on in the Answer in this case; our demurrer to the Answer should be sustained, and the action of the lower court reversed with instruction to enter judgment thereon for the plaintiff.

Counsel have thus stated their argument fully in this brief and argument, and submit the case without oral argument.

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